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No. 87-1990

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RICHARD F. BODDIE,

Petitioner,

v.

DANIEL G. FAISON, *et al.*,

Respondents.

REPLY BRIEF TO RESPONDENTS' BRIEF IN
OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**REPLY BRIEF TO RESPONDENTS'
BRIEF IN OPPOSITION TO PETITION
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Petitioner Richard F. Boddie respectfully submits his reply brief to respondents' brief in opposition to Mr. Boddie's petition for a writ of certiorari.

This reply addresses two cases which were first raised in respondents' brief in opposition. *G.A. Thompson & Co., Inc. v. Partridge*, 636 F.2d 945 (5th Cir. 1981); *Geosearch, Inc. v. Howell Petroleum Corp.*, 819 F.2d 521 (5th Cir. 1987). Brief in Opposition, at 7. These decisions do not support the Court of Appeals decision in this case, which both violates the Seventh Amendment and conflicts with the other circuit court cases which have considered similarly inconsistent and erroneous verdicts, and provide no grounds to deny the petition for a writ of certiorari.

ARGUMENT

In the petition for a writ of certiorari, Mr. Boddie demonstrated that the decision below, which imposed joint and several liability on all defendants for the largest amount of damages awarded against any single defendant, is contrary to the result reached by all other federal courts of appeal faced with inconsistent special verdicts. Instead of ordering a new trial as required by the Seventh Amendment and this Court's prior decisions, the Court of Appeals modified the jury verdict by substituting its opinion on the proper measure of damages against Mr. Boddie for that of the jury. The Court's ruling thereby increased Mr. Boddie's liability for damages from \$5,000 to \$100,000.

In opposition, respondents assert that "while this situation has arisen only rarely, the decision below comports with the other courts' treatment of the issue," citing *G.A. Thompson* and *Geosearch*, *supra*. Brief in Opposition, at 7. Respondents' reliance on these two cases is misplaced; each case is easily distinguishable from the lower court's actions in this case.

1. In *G.A. Thompson & Co., Inc. v. Partridge*, 636 F.2d 945, 964 (5th Cir. 1981), a securities fraud case, the trial court instructed the jury that \$123,825.89 was the maximum recoverable by the plaintiff against the four defendants. Finding liability, the jury brought in a verdict of \$30,956.47 against each defendant—an amount which was exactly one quarter of the total allowable damages. *Id.* at 963. The trial court, recognizing that "the jury clearly misunderstood the court's instructions and divided the total damages by

four," then modified the judgment so that each defendant was jointly and severally liable for the full amount of the recoverable damages. *Id.*¹

G.A. Thompson is distinguishable from this case on numerous grounds. First, the jury's mistake in the amount of the damages it awarded against the individual defendants was obvious on the face of the verdict; the jury, by dividing the undisputed amount of total damages among the four defendants, had failed to follow the trial court's instructions. The court compared this mistake to a clerical error which a court can correct under Fed. R. Civ. P. 60(a). 636 F.2d at 963. Thus, by entering the joint and several judgment, the court was not reexamining the facts or interpreting what the jury intended.

In this case, in contrast, not only did the Court of Appeals find the jury's award internally inconsistent, but the Court explicitly acknowledged that it could not determine what the jury intended. App., 14a. This confusion which the Court found in the verdict required remand for a new trial and could not be resolved by the Court of Appeals rewriting the jury's verdict according to its own predilections.

Second, the court in *G.A. Thompson* recognized that even the smallest addition by a court to the jury-

¹ The trial court actually entered judgment for \$126,325.89, which included the maximum damages of \$123,825.89 plus an additional \$2,500 for a commission owed to the plaintiff. 636 F.2d at 964. The appellate court recognized that the trial court's *sua sponte* addition of the \$2,500 commission—which the jury had not included in its damage award—was an impermissible additur under *Dimick v. Schiedt*, 293 U.S. 474 (1935). *Id.* Accordingly, the court held that this addition to the judgment was error and affirmed the entry of the judgment jointly and severally for \$123,825.89. *Id.*

determined liability of a defendant is impermissible. The Fifth Circuit reversed the trial court's attempt to add \$2,500 to the verdict, when that sum had never been considered or awarded by the jury. 636 F.2d at 964. Here, the Court of Appeals selected the award of \$100,000, leveled by the jury only against other defendants who did not appear at trial, and applied it to Mr. Boddie, thereby increasing his liability by \$95,000, in violation of the Seventh Amendment.

2. The result in *Geosearch, Inc. v. Howell Petroleum Corp.*, 819 F.2d 521 (5th Cir. 1987), is likewise unavailing to respondents. In *Geosearch*, a case involving insurance coverage for several oil wells, the parties stipulated to damages of \$397,695. *Id.* at 527. In answering special interrogatories, the jury found the plaintiff 45% negligent and awarded it \$218,732, or 55% of the total stipulated damages of \$397,695. *Id.* After expressing some doubt as to whether the award should be further reduced, since it is the court's duty, rather than that of the jury, to apply the reduction in damages called for under Texas comparative negligence law, the trial court ultimately entered judgment for \$218,732, the amount the jury assessed. *Id.* On appeal, the defendant argued that the award should have been further reduced by another 45%. *Id.*

The appellate court rejected that argument and affirmed the trial court's entry of the jury verdict. *Id.* at 528. The court held that since the damage figure was stipulated, it was clear that the jury had been led to believe that it should include the 45% comparative negligence reduction in its bottom line damage award. *Id.* In reaching the amount of its award, the jury had already deducted 45% from the damages

due the plaintiff and there was no need for further reduction by the court. *Id.* Thus, the Fifth Circuit held that the trial court did not err in entering the jury's verdict as issued. *Id.*

Geosearch has no application to the facts of this case. Unlike the key issue before the court in this case, there was no issue of joint and several liability involved in *Geosearch*. Furthermore, the trial court entered judgment for the amount actually awarded by the jury; there was no *increase* by the court in that figure. Thus, unlike this case, the appellate court in *Geosearch* made no modification in the jury's determination of the defendant's liability. Accordingly, like *G.A. Thompson*, *Geosearch* provides no support for respondents' opposition.

CONCLUSION

The Court of Appeals decision in this case contravenes the requirements of the Seventh Amendment and this Court's decision in *Dimick v. Schiedt*, 293 U.S. 474 (1935). The lower court's refusal to remand for a new trial in the face of an inconsistent and erroneous jury verdict and, instead, to increase Mr. Boddie's liability by \$95,000 is unprecedented. It is contrary to the result reached by all other circuit courts faced with similar circumstances. Thus, the Court of Appeals decision creates an unacceptable precedent which violates the right to trial by jury and which should be reviewed by this Court.

Accordingly, petitioner respectfully requests that the ~~Court~~ grant the petition for a writ of certiorari.

Respectfully submitted,

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